

NTSB Order No. EA-4436

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 18th day of March, 1996

Respondent .

Docket SE-13983

Respondent has appealed from the oral initial decision issued on August 29, 1995, by Administrative Law Judge William E. Fowler, Jr., at the conclusion of an evidentiary hearing.¹ In that decision, the law judge affirmed an order of the Administrator suspending respondent's commercial pilot certificate for 45 days on allegations that she violated sections

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91.119(b), 91.131(a)(1), and 91.13(a) of the Federal Aviation Regulations (FAR),² as a result of a flight below minimum altitudes over a congested area and an incursion into Class B airspace in the area of Logan Airport, without first receiving an air traffic control (ATC) clearance.³ For the reasons that follow, we deny the appeal.

Respondent argues on appeal that the law judge's initial decision fails to articulate the evidence on which his decision is based, and that his decision is not supported by substantial evidence. The gist of her complaint is that the law judge gives

²FAR §§ 91.119(b), 91.131(a)(1), and 91.13(a) provide as follows:

"§ 91.119 Minimum safe altitudes: General.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes...

(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

§ 91.131 Operation in Class B airspace.

(a) Operating rules. No person may operate an aircraft within a Class B airspace area except in compliance with § 91.129 and the following rules:

(1) The operator must receive an ATC clearance from the ATC facility having jurisdiction for that area before operating an aircraft in that area.

§ 91.13 Careless or reckless operation.

(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

³The Administrator has filed a reply brief urging the Board to affirm the law judge's initial decision.

little credence to her claim that her FAR violations should be excused because she was faced with an emergency situation. We think the law judge gave appropriate consideration to this claim of emergency and then properly rejected it as an affirmative defense. His ensuing decision is amply supported by a preponderance of the evidence, and we adopt his findings as our own.

The record establishes that on the day in question, respondent, a certified flight instructor (with less than 300 hours' flying experience at the time of the incident) employed with the fixed base operator located at the Beverly (Massachusetts) Municipal Airport, took off on a local ferry flight to Lawrence Municipal Airport, twelve nautical miles northwest. Boston's Logan Airport is located about 25 nautical miles south of Lawrence and approximately 15 nautical miles southwest of Beverly (see Exhibit A-4, Terminal Area Chart Boston). Respondent testified that she is very familiar with this area because she performs a Metro traffic reporting flight every morning in a Cessna 172.

Respondent testified that the weather conditions during her earlier traffic reporting flight, at approximately 6:00 a.m. that day, were VFR [visual flight rules]. (TR 189.) When her employer asked her later that same morning to ferry Sundowner 9222S, an aircraft that she had never operated, to Lawrence, respondent testified that she did not hesitate because she was "just used to going up here and not having any problems...."

(Exhibit A-3, Transcript of Communications with Boston TRACON Area Manager at 1641:01.)

Respondent claims that just prior to her departure on the ferry flight, at about 11:10 a.m., the weather was reported as VFR.⁴ When she was about 8 miles from her destination she dialed in for Lawrence ATIS and discovered that both her radios were inoperative. (Exhibit A-9, TR-207.) Simultaneously, she testified, she observed snow showers ahead of her to the north. She turned away from the weather, while at the same time switching from one radio to the other, trying to regain operation of her communications systems. Respondent testified that she also descended in order to remain VFR, while reaching behind her for her microphone, believing that her headset may have been the cause of her communications problems. Respondent established contact with Lawrence tower less than 5 minutes after takeoff. Unbeknownst to her, Lawrence had already been contacted by a Boston TRACON controller who was calling all of the local airports in an effort to identify an aircraft that he was observing on radar, two miles north of Logan, operating VFR at 1,400 feet. The target was observed in Class B airspace, without ATC authorization.⁵ Lawrence advised the TRACON controller that

⁴Two TRACON controllers testified that the weather at Logan was marginal VFR, and one testified that snow had been forecast in the area. (TR-84.) The Administrator did not introduce any documentary evidence to establish the reported weather at the time of respondent's departure.

⁵Class B airspace in the subject area is surface to 7,000 feet. See Exhibit A-4.

he believed he had just established contact with the target. Boston TRACON asked Lawrence tower to instruct respondent to squawk a discrete transponder code and make an immediate⁶ left turn northbound. When respondent followed these instructions (without any radio or navigation equipment problems), she was identified by Boston TRACON as the target. A data plot (Exhibit A-2) establishes that respondent's altitude was at one point as low as 700 feet in Class B airspace. The Administrator also established that this operation placed respondent's aircraft over residential areas adjacent to the airport.

Although respondent does not deny that she descended below the overcast, she does not "recall" descending to an altitude of 700 feet. Instead, she disputes the low flight allegation by claiming that her transponder was also not transmitting accurately. We are persuaded otherwise. She was observed by ATC at 1,400 feet when she reported in to the satellite north controller at an altitude of 1,400 feet. (TR-82; Exhibit A-4 at 1618:30.) The satellite north controller subsequently instructed respondent to ascend and provided her with vectors to Lawrence. Respondent specifically declined that controller's offer of additional ATC assistance. At no time did she advise Boston TRACON that she had experienced any radio, navigational, or

⁶According to the air traffic controller working the Boston TRACON satellite south radar position, he requested that respondent make an immediate left turn because all incoming traffic on final to Logan had to be diverted in order to avert a midair collision, as a result of respondent's incursion. (TR-59.)

avionics difficulties, nor did she ever declare an emergency.

When respondent finally landed at Lawrence, she called the ATC Manager at Boston TRACON, as requested by the controller. She admitted that she had become "disoriented" and "discombobulated" (Exhibit A-3 at 1641:01 and 1641:19) because of the snow and her problems with her radios and navigational equipment, and she admitted to the law judge that she was not sure of her position. (TR-191.)⁷ She explained that she "kept descending thinking it [the weather] was going to get better and it didn't." (Exhibit A-3 at 1642:25.) When asked on cross-examination why she did not just turn her aircraft around [and return to Beverly airport], she replied, "Because I wasn't sure how far it [the snow] was and it seemed to be moving fast. I didn't know if it was just a stationary front or what, but it didn't seem to be moving south...." (TR-208.) In other words, respondent made a calculated decision to try to remain VFR and to not return to her point of departure, even though her radios had intermittently failed within minutes of takeoff and notwithstanding the fact that the weather was now marginal VFR.

The Administrator presented the testimony of an FAA inspector with over 26 years with the agency and 8,000 hours' flying time. He testified that even if one's communication and navigation equipment becomes inoperative, the prudent pilot will try to not lose sight of his or her ground references and use the

⁷Her testimony that she was "in shock" when she realized just how far south she had flown reveals the extent of her disorientation. (TR-215.)

magnetic compass and directional gyro in order to remain in control of the aircraft's position. In his opinion, had respondent resorted to such procedures she could have safely returned to Beverly airport.⁸ Certainly she should have used her magnetic compass, which was available and operative, to avoid turning directly towards Logan Airport.

In sum, respondent's unauthorized incursion into Class B airspace and her descent below minimum altitudes in a congested area adjacent to Logan Airport were a direct result of her imprudent decision to not return to Beverly airport. Her violations did not occur because of her momentary inability to make contact with Lawrence tower, nor was she forced to enter Class B airspace because of the snow showers she faced if she proceeded directly to her destination. Thus, we agree with the law judge's rejection of an emergency defense. FAR Section 91.3(b) permits a deviation from Part 91's rules only to the extent required to meet that emergency. The situation which respondent faced, regardless of whether it was of her own making, cannot serve to excuse her deviations because there is no causal connection between the two. Administrator v. Freeman, NTSB Order No. EA-3793 at 11 (1993).

⁸Respondent's attempt to disparage this expert opinion because he stated that she should have gone north, rather than south, to Beverly, is unavailing.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied;
2. The law judge's initial decision and order are affirmed; and
3. The 45-day suspension of respondent's commercial pilot certificate shall begin 30 days after service of this order.⁹

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

⁹For the purpose of this order, respondent must physically surrender her certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(f).